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In the Supreme Court
of the United States

OCTOBER TERM, 1969

No. 1 8 6 9

WILLIAM SIMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Ninth Circuit

GEORGE MEAD
Public Service Building
Portland, Oregon 97204
Counsel for Petitioner

BERNARD SHEVACH
504 Executive Building
Portland, Oregon 97204
of Counsel

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-70

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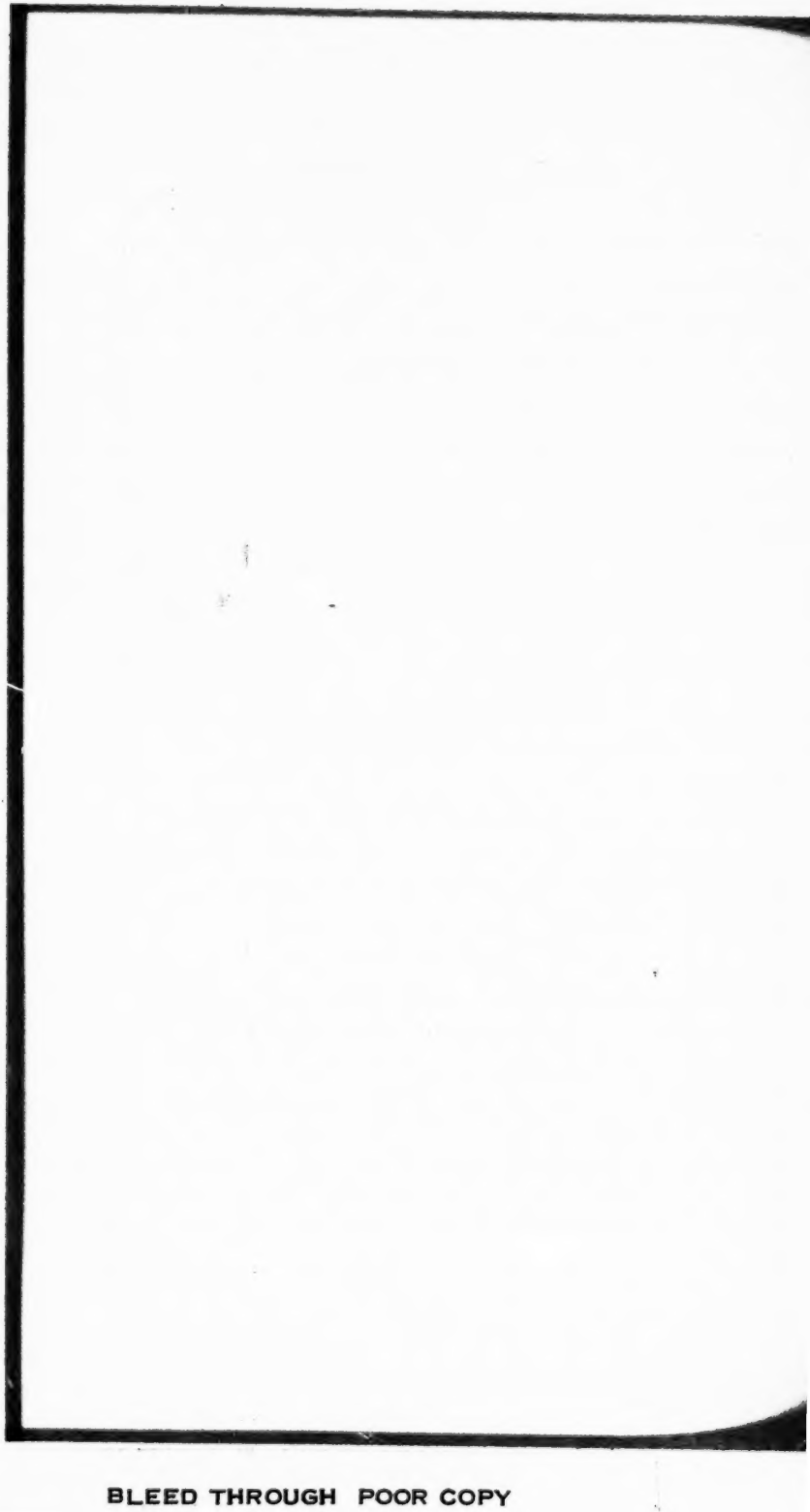

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WILLIAM SIMON,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Ninth Circuit

The Petitioner, William Simon, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, pp. 1A-3A) is not yet reported. The District Court of the District of Oregon, rendered unreported opinions on a pretrial motion to suppress evidence (Ap-

pendix B, pp. 4A-5A); and a second pretrial motion to suppress evidence (Appendix B, p. 6A). [(3) The District Court also rendered unreported Findings of Fact and Conclusions of Law (Appendix B, pp. 7A-16A).]

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1970. On February 21, 1970, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including March 27, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of the Rules of this Court.

QUESTIONS PRESENTED

Whether evidence admitted upon the tax evasion trial and conviction of petitioner should have been excluded as obtained by an Internal Revenue Service Special Agent in violation of petitioner's constitutional privilege against self-incrimination and right to counsel, where the evidence was obtained after the Internal Revenue Service commenced a criminal investigation of petitioner and the criminal investigator did not give petitioner the Miranda warnings prior to his interrogations.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment—"The right of the people to be secure in their persons, houses, papers, and ef-

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fects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment—"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *"

Sixth Amendment—"In all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner herein was convicted in the District Court for the District of Oregon of violations of 26 U.S.C. § 7201 relating to wilful evasion of federal income tax for the years 1961 through 1964, and of violations of 26 U.S.C. § 7201(6) relating to the wilful filing of false excise tax returns for yearly quarterly returns beginning in the second quarter of 1962 and ending in the second quarter of 1965. The Court of Appeals for the Ninth Circuit affirmed the judgment of conviction. The jurisdiction of the District Court was based on 18 U.S.C. § 3231.

Petitioner operates two luggage stores in Portland, Oregon. His education ended after one year in high school and he has never had any instruction or training in bookkeeping or accounting (Tr. 472-474).

The tax returns found to be fraudulent were prepared by Maurice Geller, an independent public accountant. Geller was indicted together with petitioner but was to be tried separately after the conclusion of petitioner's trial. At petitioner's trial, Geller was subpoenaed by petitioner to testify as a witness; however, being represented by his own and independent counsel, Geller refused to testify, relying on his constitutional privilege against self-incrimination.

On December 28, 1965, Internal Revenue Agent Louis Sokol placed a telephone call to petitioner at one of his stores and advised him that he (Sokol) was assigned as an Internal Revenue Agent to audit an item on petitioner's tax returns. Petitioner referred Revenue Agent Sokol to his accountant Geller, and on January 10, 1966, Sokol met with Geller and examined some of Geller's work papers (Tr. 63-70, 492-493.) Sokol made an appointment to see petitioner on January 25, 1966 at his store, and on said date met petitioner and Geller there. After inspecting petitioner's records, Sokol discovered that sales figures in Simon's books had been totaled incorrectly ("underfooted") to show smaller receipts for a number of months. Sokol filed a report on January 28, 1966, suggesting that this might be a criminal case and that it should be investigated by the Intelligence Division (Tr. 123-124).

Walter J. Sanders, Jr., a Special Agent of the Intelligence Division of the Internal Revenue Service, was then assigned to the case and he and Sokol met

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with petitioner at his store on February 4, 1966 (Tr. 131-132). No appointment was made or advance notice given for this meeting, although other meetings were arranged by telephone (Tr. 226; 65-66; 158). A Special Agent is not called in unless there is an allegation that a taxpayer has committed a criminal violation against the tax laws of the United States, and the sole function of the Special Agent is to conduct an investigation for the purpose of determining whether a taxpayer has, in fact, committed a crime against the tax laws with reference to tax evasion (Tr. 218; 233).

Special Agent Sanders testified that before interrogating petitioner, he advised him of his right to remain silent and that petitioner's statements might be used against him "if the Government decided to prosecute" (Tr. 133-134; 138-139). Sanders further testified that he told petitioner "that it would be necessary that I would have access to his records in order to substantiate his statements * * * (Tr. 138); and that petitioner "had a right to refuse to turn the records over to me because they could be used against him if the Government decided to prosecute him for tax evasion" (Tr. 138).

Petitioner denied that Sanders advised him of his right to remain silent, denied that Sanders advised him of his right to refuse a turnover of his records, and denied that he was advised that statements made or records produced could be used against him; instead, petitioner testified, Sanders only told him that

if he did not cooperate by voluntarily producing the records, Sanders would compel their production by a Court order (Tr. 465-67).

Sanders and petitioner both testified, and the record is clear and uncontradicted, that petitioner at no time was advised of his right to counsel, or of his right to have counsel present during any of the interrogations conducted by the Special Agent whose function it was to investigate whether petitioner had criminally violated the tax laws of the United States (Tr. 219; 234; 468).

Petitioner testified that Sanders at no time identified himself as a Special Agent of the Bureau of Internal Revenue and at no time stated that he had come to petitioner's store to investigate the possibility of a crime involving tax fraud and evasion (Tr. 465). Sanders testified that he told petitioner that his (Sanders') job was to determine whether or not there was any criminal intent on petitioner's part to evade taxes (Tr. 133).

On February 4th, Sanders received the daily sales records for both stores for the years 1962, 1963 and 1964 and bank statements, cancelled checks and check stubs for the years 1961-1964. These documents were admitted into evidence as Government Exhibits 28-B, 28-C and 28-D over objection (Tr. 140-41). The Court permitted defense counsel to make a continuing objection to all of Sanders' testimony (Tr. 132). Counsel objected to introduction of all documents obtained on February 4th or prepared from such docu-

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ments (Tr. 100-03, 141, 145, 147, 148-49, 151, 154, 156, 158, 160, 167, 194-5, 267, 297.)

Sanders and Sokol got additional records from Geller on February 7th (Tr. 141-142). Sanders got additional documents from Henry S. Blauer, an accountant employed by petitioner in connection with this investigation, on February 11th (Tr. 146-47), February 18th (Tr. 150-51), and March 3rd (Tr. 158-60). Sanders and Sokol got additional records from petitioner at his office on February 16th (Tr. 148-49) and February 21st (Tr. 153-54). Blauer, who was called in on February 5th, testified that the important records had been turned over to Sanders and Sokol by then. (Tr. 342). No additional cautionary statements of the petitioner's constitutional rights and privileges were made at any of these times. All of the documents obtained by the I.R.S. agents from petitioner were personal business records.

Counsel for petitioner had moved to suppress this evidence prior to trial on the ground of unlawful search and seizure. *Counsel for ~~defendant~~ conceded that if this evidence were suppressed, there would not be a trial* (Tr. 21).

The trial court took this motion under advisement to permit live testimony concerning the meeting of February 4th (Tr. 23-24). This motion was denied after trial (Appendix B, p. 6A). Counsel had previously moved to suppress evidence on the ground that it had been obtained in violation of petitioner's Fifth Admendment privilege against self-incrimination and

right to counsel (Record 17, 41). This motion was denied before trial (Appendix B, 5A).

On appeal, the Circuit Court of Appeals for the Ninth Circuit rejected petitioner's contention that his Fourth, Fifth and Six Amendment rights were violated because he was not given the Miranda warnings by the Government's investigating agent. The Court of Appeals concluded, notwithstanding petitioner's testimony to the contrary, that petitioner was told at the outset that Sanders was a criminal investigator for the Internal Revenue Service, that he had a right to remain silent, and that he need not comply with Sanders request to produce records. The Court of Appeals determined that petitioner voluntarily made his statements and produced his records. *Nowhere did the trial court or the Court of Appeals find that petitioner was warned of his right to the assistance and presence of counsel at the interrogations.*

The Court of Appeals, in the following language, expressly rejected the reasoning of the majority opinion in *United States* v. *Dickerson*, 413 F.2d, 1111, decided by the Court of Appeals for the Seventh Circuit on July 28, 1969:

> "Simon places considerable reliance upon United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969) a recent decision of the Seventh Circuit rendered by a divided panel. He says that the facts in that case are indistinguishable from those in the case at bar. However, there the Special Agent, unlike his counterpart in the case before us, did not explain his function to the ap-

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pellant nor give him any warnings whatsoever. The failure was held to constitute conclusive proof of coercion. We decline to give the failure such weight, even if it were evident in this case. As well said by the Second Circuit in commenting upon and declining to follow *Dickerson*:

> 'The fact that IRS agents sometimes give a partial warning at one or even several interviews during a protracted investigation does not mean that warnings of some kind are or should be required. Rather, proof that some warnings were given, or that none were given, merely serves as evidence bearing on the question of whether the questioning was non-coercive.'" (Appendix A, p. 3A).

REASONS FOR GRANTING THE WRIT

A.

The opinion below is directly and expressly in conflict with the opinion of the United States Court of Appeals for the Seventh Circuit in United States v. Dickerson, 413 F.2d 1111 (1969)

In *Dickerson*, the defendant taxpayer was interviewed at his place of business on several occasions by a Special Agent of the Intelligence Division of the Internal Revenue Service, together with an Internal Revenue Agent, who failed to give the defendant the warnings set forth in *Miranda* v. *Arizona, 384 U.S. 436 (1966)*. *Miranda* mandated the giving of the following warnings under the following circumstances:

"Our holding will be spelled out with some

specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at p. 444.

Additionally, *Miranda* explicity held at 384 U.S. at pp. 471, 472 that *all* of the foregoing warnings are essential:

"Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during the interrogation under the system of protecting the privilege we delineate today. *As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation.* No

amount of circumstantial evidence that all persons may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right." (Emphasis supplied.)

In *Dickerson*, the defendant's motion to suppress the evidence obtained from him during the criminal investigation by the Special Agent was granted because the *Miranda* warnings were not given. The Seventh Circuit stated its holding as follows at 413 F.2d, pp. 1116, 1117:

> "*Our conclusion is that Miranda warnings must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division.* We have reached this conclusion on the basis of our examination of the circumstances surrounding criminal tax investigations generally, and we find that the objective circumstances of such confrontations with government authority warrant the above warnings without regard to the individual taxpayer's subjective state of mind. Absent such warnings, the motion to suppress in the present case was property granted." (Emphasis supplied.)

In *Dickerson*, the government argued that the absence of custodial detention and other indicia of criminal prosecution in the investigation served to negative any possibility of coercion or overbearing of the defendant's will. The Seventh Circuit disposed of this

contention adversely to the government's contention by approvingly quoting the following excerpt from the opinion of the *Dickerson* trial court:

> "It would seem to us that the average citizen, faced with repeated questioning by two government agents is in an ominous situation to say the least. The Government suggests that the defendant was in no way physically restrained, but we doubt that he really felt free to walk out on the investigators from the Internal Revenue Service. In the absence of sufficient warnings and the assistance of counsel, there are innumerable factors which act on the taxpayer's mind compelling him to 'co-operate' with the federal authorities." 413 F.2d at p. 1116.

Thus the doctrine of *Dickerson* is that a Special Agent who is investigating a taxpayer for a criminal violation of the tax laws, must give the taxpayer *all* of the *Miranda* warnings at the *first* contact with him and a failure to do so will cause the granting of a motion to suppress evidence obtained thereafter.

In the case at bar, the record is clear that the petitioner was never given the *Miranda* warning of his right to the presence of counsel during interrogation. Also, as in *Dickerson*, the petitioner was faced with the ominous situation of being interrogated by two government agents and could not have felt free to leave. Furthermore, the interrogators, including the Special Agent, came to petitioner's premises in a surprise visit for the announced purpose (as the Court of Appeals found) of determining whether petitioner had

committed a crime; and the announcement of this purpose would inevitably compel the unrepresented petitioner to remain for the interrogation, since a laymen, such as petitioner, could well believe that a failure to answer his interrogators would lead to an assumption of guilt by them, with resulting criminal charges against him. This belief could only be bolstered by Sanders statement to petitioner "that it would be necessary that I would have access to his records in order to substantiate his statements" (Tr. 138). Under these coercive circumstances, it cannot be said that petitioner "freely consented" to a search of his records or "willingly" made statements, as the Court of Appeals erroneously determined (Appendix A, pp. 2A, 3A). Thus petitioner was deprived of his freedom of action in a significant way within the intendment of both *Dickerson* and *Miranda*.

This Court has of course already decided in *Mathis* v. *United States*, 391 U.S. 1 (1968), that *Miranda* warnings apply to tax investigators.

B

The opinion below has decided the issue of right to counsel and the privilege against self-incrimination in a way that conflicts with the applicable decisions of this Court.

The basic vice of the interrogation by the agents in the case at bar was the complete and undisputed failure to warn petitioner of his right to counsel. Without the *Miranda* warning of the right to have counsel

present during the interrogation process, the giving of any other *Miranda* warnings is valueless since other warnings alone will not be sufficient to assure that the individual's right to choose between silence and speech remains unfettered through the interrogation process. This principle was stated in *Miranda* as follows:

> "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. *Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.* Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A *once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more 'will benefit only the recidivist and the professional.*" 384 U.S. at pp. 469, 470 (Emphasis supplied).

In the case at bar, it must be remembered that the first contact of the Special Agent to interrogate the petitioner came in a surprise, unannounced visit, although prior visits by the Revenue Agent were arranged by telephone appointment. The only legitimate conclusion from this course of conduct, coupled with the failure to warn petitioner of his right to

counsel, is that the Special Agent deliberately sought to prevent the petitioner from having any opportunity to consider retention of counsel when the criminal investigation commenced. Thus petitioner's constitutional rights were nullified and the warnings found to be given by the court of appeals could not and did not fulfill their purpose of providing petitioner with a choice between silence and speech. As *Miranda* points out, under these circumstances petitioner cannot meaningfully be said to have received *any* of the *Miranda* warnings.

In *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), this Court, in holding that there is a right to counsel before indictment, pointed out in the following language that the right to have counsel at trial is completely devoid of meaning unless an accused person has counsel at crucial and relevant times before trial:

> "The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pretrial examination.' In re Groban, 352 U.S. 330, 344, 1 L ed 376, 387, 77 S Ct. 510 (Black, J. dissenting) 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial." ' " 378 U.S. at pp. 487, 488.

In the case at bar the petitioner's right to counsel

at trial was rendered largely nugatory precisely because of the reasons set forth in *Escobedo*, that is that the pretrial criminal examination by the Special Agent and the Revenue Agent virtually assured petitioner's conviction when the trial court accepted the agents' version of the pretrial interrogations.

This Court has consistently recognized that having the right to assistance of counsel is the absolute bulwark, the absolute cornerstone and foundation upon which the precious constitutional rights of a person accused of or investigated for crime must rest. This Court accordingly should take jurisdiction of the case at bar to pronounce again the right to counsel, and the warning of the right to counsel to be accorded a person in the situation of the petitioner. Unless this Court resolves this matter, justice in this Republic can be undermined by a continuing erosion of our constitutional safeguards.

With reference to the warning that Sanders alleges that he gave to petitioner on February 4th concerning petitioner's privilege against self-incrimination, the alleged warning falls below the standard established by *Miranda*.

Miranda requires the following:

> "The warning of the right to remain silent must be accompanied by the explanation that anything said *can and will* be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it." (Emphasis supplied; 384 U.S. at p. 469.)

Sanders' statement that "if the Government decided to prosecute (petitioner) for tax evasion" petitioner's statements would be admissible (Tr. 133) seems conceived to elicit cooperation rather than to awaken the petitioner to his full constitutional right to silence. It is the opposite of an explanation that statements made *"can and will"* be used against the petitioner in court. This so-called warning, together with the failure to advise the petitioner of his right to counsel, prevents Sanders' statements from complying with the *Miranda* standards.

C

The case at bar must be heard in order to avoid a multiplicity of future litigation and in order to provide definitive rules for the Internal Revenue Service in the interrogation of a taxpayer investigated for criminal violation of the tax laws.

The situation of the petitioner, being investigated for a crime against the tax laws and not being given the *Miranda* warnings, has been and will be duplicated many times and on many occasions. Every time that a Special Agent enters a tax investigation, the situation of the petitioner can reoccur. Thus a decision by the Court in this case can render the following service: (1) the precedent of a decision herein will serve to define the applicable law, thus avoiding much future litigation and uncertainty; (2) a decision herein will provide guidelines and rules by which agents of the Internal Revenue Service must

abide. It is not enough that the Internal Revenue Service may promulgate its own rules for the guidance of its agents, since the Service may at any time revoke, amend or change its rules. Constitutional issues can only be decided with finality by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE MEAD
Counsel for Petitioner
Public Service Building
Portland, Oregon 97204

March 23, 1970

BERNARD SHEVACH
504 Executive Building
Portland, Oregon 97204
of Counsel

APPENDIX

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM SIMON, *Appellee*
vs.
UNITED STATES OF AMERICA *Appellant*,
No. 24,758

[January 26, 1970]

Appeal from the United States Court
for the District of Oregon.

Before: KOELSCH, BROWNING and DUNIWAY, Circuit Judges.

PER CURIAM.

William Simon was convicted of income tax frauds. (26 U.S.C. 7201 and 7206(1). On this appeal he urges that his Fourth, Fifth and Sixth Amendment rights were violated because he was not given the *Miranda* warnings by the government's investigating agent. Specifically he assigns as error the admission of evidence consisting of incriminating statements made by him to Walter J. Sanders, Jr., a Special Agent of the Intelligence Division of the Internal Revenue Service, and of information gained by the Agent from an inspection of Simon's business records.

APPENDIX A
Opinion of the Court of Appeals

We conclude that *Miranda* is inapplicable to this case and that Simon freely consented to the asserted search.

This court has repeatedly rejected vigorous appeals to extend the *Miranda* rule "beyond its stated limits." *Spahr* v. *United States*, 409 F.2d 1303, 1305 (9th Cir. 1969). Absent custody in the conventional sense, we have declined to fault a government agent and reverse a conviction for failure to give a *Miranda* type warning unless the facts clearly demonstrated that the appellant was "deprived of his freedom by the authorities in any significant way."

The circumstances in this case hardly disclose an "in custody investigation." The initial meeting between Sanders and Simon was held in the latter's private office at one of his stores. Simon was at liberty to come and go as he pleased or to ask Sanders to leave. Nor did Simon's conduct at the meeting, or thereafter, suggest that he was, or believed that he was, under any compulsion to divulge information. Quite the contrary. Upon being told at the outset that Sanders was a criminal investigator for the Internal Revenue Service and, being affirmatively advised of his right to remain silent, Simon declared that he had "nothing to hide" and expressed a willingness to answer any questions concerning his business and tax returns.

Simon places considerable reliance upon *United States* v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969),

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a recent decision of the Seventh Circuit rendered by a divided panel. He says that the facts in that case are indistinguishable from those in the case at bar. However, there the Special Agent, unlike his counterpart in the case before us, did not explain his function to the appellant nor give him any warnings whatever. The failure was held to constitute conclusive proof of coercion. We decline to give the failure such weight, even if it were evident in this case. As well said by the Second Circuit in commenting upon and declining to follow *Dickerson:*

> "The fact that IRS agents sometimes give a partial warning at one or even several interviews during a protracted investigation does not mean that warnings of some kind are or should be required. Rather, proof that some warnings were given, or that none were given, merely serves as evidence bearing on the question of whether the questioning was non-coercive."
>
> United States v. Caiello, — F.2d — (#33175), (2d Cir. Dec. 31, 1969).

The claim of unreasonable search and seizure is similarly unsupported. Sanders could hardly be said to have gained access to Simon's records by trickery or deceit *(Spahr* v. *United States, supra).* Not only did he state why he wanted to see them, but he additionally accompanied his request with the statement that Simon need not comply.

The judgment is affirmed.

APPENDIX B

Rulings on Motions, Findings of Fact and Conclusions of Law of the United States District Court.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERCIA, *Plaintiff,*	
vs.	CR. 68-67
WILLIAM SIMON and MAURICE D. GELLER, *Defendants.*	Portland, Oregon May 20, 1968

JUDGE'S DECISION

BEFORE:

The Honorable Robert C. Belloni, United States District Court Judge.

APPEARANCES:

Messrs. Sidney I. Lezak and Norman Sepenuk, United States Attorney and Assistant United States Attorney, appearing in behalf of the Government.

Messrs. George Mead and Bernard Shevach, co-counsel for the Defendant Simon;

Mr. Robert Carney, counsel for the Defendant Geller.

THE COURT: Gentlemen, I see no reason for me to take this matter under advisement and do any further studying on it. I have spent hundreds of hours recently engaged in search of the law on mo-

tions to suppress in tax cases. They have been mostly in the field of illegal search and seizure, which presents a different problem. But the different problem in this case is the Escobedo, Miranda, and now Mathes (sic) Rules, which I certainly think I understand.

The motion to suppress is denied. I agree that the taxpayers in a criminal case are entitled to all of the protection of the Miranda Rule; but certainly tax violators are entitled to no more protection than to other accused criminal violators. The Miranda case required these mechanical warnings to be given when the party was in custody or deprived of his freedom of action in any significant way. It is hard for me to understand the argument that a man's place of business is less familiar to him than the inside of a jail is to a convict. This doesn't apply to Mr. Carney's client, but the rest of the reasoning does. In this case, no one was deprived of his custody or in-custody or was deprived of his action in any significant way. There is no claim that the statements were otherwise involuntary.

So the motion to suppress is denied.

Certified to be a true and accurate transcript.

JOSEPH F. MCCLOSKEY, JR.
Official Court Reporter

APPENDIX B
Rulings on Motions, Findings of Fact and Conclusions of Law of the United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA	No. CR. 68-67
vs.	
WILLIAM SIMON, *Defendant*	Order Denying Motion

Defendant William Simon's Motion to Suppress evidence because of a violation of an unlawful search and seizure in violation of Amendment IV to the Constitution of the United States is not well taken. This Court finds the facts as submitted in the Government's Answer to this motion. Defendant was not threatened nor were misrepresentations made to him with reference to the production of the books and records which are subject of this motion. On the contrary, defendant was apprised of the fact his records were sought for investigatory purposes by a Special Agent of the Internal Revenue Service and that he need not make them available. Knowing the foregoing, defendant offered his cooperation and voluntarily relinquished his records. He cannot now be heard to complain.

IT IS ORDERED that the motion to suppress evidence be and it is denied.

Dated this 7th day of July, 1969.

ROBERT C. BELLONI
United States District Judge

APPENDIX B

Rulings on Motions, Findings of Fact and Conclusions of Law of the United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA vs. WILLIAM SIMON, *Defendant*	No. CR. 68-67 Findings of Fact and Conclusions of Law

On March 8, 1968, a Federal Grand Jury indicted William Simon in seventeen (17) counts. The first four counts deal with income tax and generally charge the wilful attempt to evade and defeat income tax for the years 1961, 1962, 1963 and 1964, in violation of 26 U.S.C. § 7201. Counts V through XVII deal with the excise tax and generally charge the wilful filing of false excise tax returns for the thirteen quarters, beginning in the second quarter of 1962 and ending in the second quarter of 1965; all in violation of 26 U.S.C. § 7206(1).

I

FINDINGS OF FACT

1. From the year 1958 and before, defendant has owned two luggage stores in Portland, Oregon; one located on S.W. Alder Street and the other located on S.W. Washington Street.

2. Defendant kept the summary account books for both stores, recording daily and monthly sale totals in those books.

APPENDIX B

Rulings on Motions, Findings of Fact and Conclusions of Law of the United States District Court

3. Defendant wrote the checks for store and personal expenses and entered these amounts on his check stubs.

4. Mr. Maurice Geller was defendant's accountant during the period charged in the Indictment and performed among other things, the following duties for the defendant:

A. Geller prepared defendant's income tax returns for 1961, 1962, 1963 and 1964. In preparing defendant's income tax returns, Geller used the following sources, among others, to determine income:

(1) Figures representing total monthly sales income from the summary books of both the Washington and Alder Street stores.

(2) Interest income information supplied by defendant.

(3) Business expense information from defendant's check stubs.

B. Geller prepared defendant's excise tax returns for the thirteen quarters beginning in the second quarter of 1962 and ending in the second quarter of 1965. In determining defendant's excise tax liability for a given quarter. Geller would use summary book total figures entered by defendant representing total monthly sales not subject to excise tax and total monthly sales. These figures were often incorrectly entered by defendant.

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APPENDIX B
Rulings on Motions, Findings of Fact and Conclusions of Law of the United States District Court

5. Defendant failed to report income and income tax liability in the years 1961, 1962, 1963 and 1964 as follows:

INCOME

Year	Reported Original Return	Additional	Corrected	Amount Reported
1961	$7,300.15	$16,948.42	$24,248.56	30.11%
1962	2,171.98	23,729.43	25,901.41	8.39%
1963	7,320.02	13,645.50	20,965.52	34.91%
1964	2,139.63	21,494.63	23,634.26	9.05%
Totals	$18,931.78	$75,817.98	$94,749.75	19.98%

INCOME TAX
DOES NOT INCLUDE SELF-EMPLOYMENT TAX

Year	Reported Original Return	Additional	Corrected	Amount Reported
1961	$1,495.23	$ 5,380.85	$ 6,876.08	21.75%
1962	396.80	7,183.20	7,580.00	5.23%
1963	1,501.89	4,116.49	5,618.38	26.73%
1964	329.61	5,573.53	5,903.14	5.58%
Totals	$3,723.53	$22,254.07	$25,977.60	14.33%

6. Defendant wilfully attempted to evade and defeat income tax liability in the years 1961, 1962, 1963 and 1964 in the amount summarized in paragraph 5 in the following manner:

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Rulings on Motions, Findings of Fact and Conclusions of Law of the United States District Court

A. Defendant underfooted (indicated a smaller figure than if properly added, i.e. 2 plus 2 equals 3) the sales totals in the summary books of both his Alder and Washington Street stores for the years 1961, 1962, 1963 and 1964 as summarized in Government's Exhibit 42(a) through 42(d).

(1) Since the underfooted totals were used to compute income, substantial amounts of income were not reported on defendant's income tax return for the year involved.

(2) The reasons given by the defendant for these underfootings lack credibility, are often without factual foundation, and are therefore rejected. Defendant's intent in undertaking this underfooting is clear; to evade and defeat income tax liability.

B. Defendant did not record income in the summary books for both his Alder and Washington Street stores for the years 1961, 1962, 1963 and 1964 as summarized in Government's Exhibit 43.

(1) This income was not reported on defendant's income tax return for the year involved.

(2) Again, the reasons given by defendant for his failure to record this income lack credibility, are often without factual foundation, and are therefore rejected. Defendant's intent in failing to record this income is clear; to evade and defeat income tax liability.

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C. Defendant wilfully failed to report all of the interest income he received in the years 1961, 1962, 1963 and 1964 as summarized in Government's Exhibit 44.

D. Defendant wilfully overstated business expenses on his 1962 income tax return by $9,000.00.

7. Defendant knowingly owed excise tax in addition to that reported in his excise returns for the thirteen quarters beginning with the second quarter of 1962 and ending the second quarter of 1965 as summarized in Government's Exhibits 60 through 67.

8. Defendant wilfully and knowingly failed to report all of the excise tax due and owing the United States for the subject period. This result was achieved in the following ways:

A. As previously referred to in paragraph 6(a) above, defendant underfooted the sales totals in the summary books of both his Alder and Washington Street stores as summarized in Government's Exhibits 42(a) through 42(d). Since these distorted figures were used in the computation of defendant's excise tax liability, that liability was misrepresented.

B. Defendant wilfully misclassified three sales in his Washington Street store's summary books as subject to excise tax which in reality these sales were subject to the excise tax as summarized in Government's Exhibit 51.

(1) These three sales involved a total of $1,916.51.

(2) These amounts were not included on defendant's excise tax returns for the quarter invloved.

C. Defendant overfooted (indicated a figure larger if properly added, i.e. 2 plus 2 equals 5) a number of totals in the summary books of the Washington Street store representing sales not subject to excise tax as summarized in Government's Exhibit 51. These distorted figures were used in the computation of defendant's excise tax liability. This overfooting resulted in failure to report large amounts of excise tax liability.

D. Defendant failed to record thirteen sales subject to excise tax in his summary books as summarized in Government's Exhibit 43. These sales were not reflected on the excise tax returns for the quarter involved.

E. In June of 1965, $5,081.45 in sales subject to the excise tax and upon which excise tax was collected by defendant, were not reported on defendant's excise tax returns for the subject quarter.

9. Generally, the defendant has not challenged the fact that income and excise tax liability was not reported and that this failure was achieved in the manners set out above. Defendant's primary defense has

been that he lacked the requisite knowledge and wilfullness to be guilty of the crimes charged. In addition to the evidence discussed above, this knowledge and wilfullness is found from the following evidence:

A. Notwithstanding defendant's explanations or lack of explanation for the various ways the Government was deprived of income and excise tax by defendant, the numerous income and excise tax omissions did occur and these were attributed to far too numerous reasons to have happened by mistake and in good faith.

B. Government's Exhibit 67 shows the percentage of taxable income and income tax reported by defendant compared to what actually should have been reported. These figures are pursuasive evidence that defendant knew the amount of income reported was incorrect especially when considered with the fact that defendant worked in both stores and kept the account summary books for both stores during this period.

C. Further evidence of defendant's knowledge and wilfullness is found in the statements made by defendant to Agents Walter J. Sanders and Louis Sokol, Internal Revenue Service.[1]

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[1] (1) On January 25, 1966, when Agent Sokol discovered defendant's underfootings, defendant's immediate response was to blame his accountant, Maurice Geller, for the underfootings. He also attributed the underfootings to machine error. This, in the light of defendant's courtroom testimony,

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II

CONCLUSIONS OF LAW

1. With reference to Counts I through IV of the Indictment, this Court finds as follows:

A. Defendant owed the United States additional income tax for the years 1961, 1962, 1963 and 1964 as follows:

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was a fabrication since he knew very well that he had made the underfooted entries himself.

(2) On January 26, 1966, defendant told Agent Sokol that his accountant, Maurice Geller, knew nothing about the underfootings in the summary books of the Alder Street Store. This statement is again contrary to what defendant testified to at his trial, which was that Mr. Geller learned of the underfootings some time in 1958 and was instructed by him, defendant, to re-compute the underfooted totals for income tax purposes.

(3) On January 26, 1966, defendant told Agent Sokol that the reason for underfooting the summary books of the Alder Street Store was because the Alder Street Store lease contained a rental provision based on a percent gross receipts. This statement was a fabrication as shown by the terms of the leases on that property. The lease on the Alder Street store at all times during the period in question contained a rental based on a straight monthly figure. Defendant continued with this fabrication concerning a percentage rental on the Alder Street Store by asking Agent Sokol not to go back to the lessor of the Alder Street Store with the information Sokol discovered concerning the underfootings.

(4) On January 26, 1966, the defendant told Agent Sokol that there was no underfootings in the summary books of the Washington Street Store. This is contrary to what has been proved by the Government and defendant's own testimony.

(5) On February 4, 1966, defendant told Agents Sanders and Sokol that Mr. Geller knew nothing about the underfootings in the summary books of the Alder Street Store. As discussed above, this was a fabrication. Defendant also stated to Sanders that there was no underfootings in the summary

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INCOME TAX
DOES NOT INCLUDE SELF-EMPLOYMENT TAX

Year	Reported Original Return	Additional	Corrected
1961	$1,495.23	$ 5,380.85	$ 6,876.08
1962	396.80	7,183.20	7,580.00
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1964	329.61	5,573.53	5,903.14
Totals	$3,723.53	$22,254.07	$25,977.60

B. Defendant wilfully attempted to evade and defeat this tax due and owing the United States in 1961, 1962, 1963 and 1964.

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books prior to 1962. This, by defendant's own admission at trial, was a fabrication. When asked by Agent Sanders whether there was underfooting in the summary books of the Washington Street Store, defendant again lied telling Agent Sanders that he had not underfooted the summary books of the Washington Street Store, that there was no rental problem there. Defendant further stated to Agent Sanders that his excise tax had been corectly reported. Not only was his excise tax understated because of the underfootings, but more importantly, defendant had embarked on concerted effort to cheat on his excise tax by overstating the totals in the columns in his summary books with reference to sales not subject to excise tax, as discussed above.

(6) On February 1, 1966, defendant told Agents Sanders and Sokol that he underfooted the gross receipts totals in the summary books of both his stores for the years 1960 on. This statement, of course, contradictory to the previous statements Mr. Simon had made to Agents Sanders and Sokol. When asked about the underfootings prior to the year 1960, defendant stated to the Agents that no such underfooting had occurred prior to 1960. Defendant then changed his story stating that he did not think there was anything wrong in the earlier years. The Government has shown that defendant underfooted totals in his summary books at both stores from 1958 through June of 1965.

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C. The defendant is guilty beyond a reasonable doubt under Counts I, II, III and IV of the indictment.

2. With reference to Counts V through XVII in the Indictment, this Court finds:

A. Defendant owed the United States additional excise tax for the thirteen quarters beginning in the second quarter of 1962 and ending in the second quater of 1965 as summarized in Government's Exhibits 60 through 67.

B. Defendant wilfully subscribed Federal Excise Tax Returns for the thirteen quarters beginning in the second quarter of 1962 and ending in the second quarter of 1965 which contained the provision that they were signed subject to the penalties of perjury, which returns defendant did not believe to be true and correct as to the amount of excise tax due and owing the United States.

C. Defendant is guilty beyond a reasonable doubt under Counts V, VI and XVII of the indictment.

Dated this 7th day of July, 1969.

ROBERT C. BELLONI
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 1970, three copies of the petition for writ of certiorari were air mailed, postage prepaid, to the Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C., 20530, counsel for the respondent. I further certify that all parties required to be served have been served.

GEORGE MEAD,

Public Service Building
Portland, Oregon 97204
Counsel for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1349

WILLIAM SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial to the court, petitioner was convicted of having wilfully attempted to evade his income tax for the years 1961, 1962, 1963 and 1964 (in violation of Section 7201 of the Internal Revenue Code) and of wilful filing of false excise returns between the second quarter of 1962 and the second quarter of 1965 (in violation of Section 7206(1)). The question presented by the petition is whether a special agent of the Internal Revenue Service's Intelligence Division investigating petitioner for criminal tax

fraud was required under *Miranda* v. *Arizona*, 384 U.S. 436, to warn petitioner that he had a right to the presence and assistance of counsel in the investigation.[1]

The district court found that the petitioner was neither in custody nor otherwise deprived of his freedom or coerced in any significant way, and therefore held that the requirements of *Miranda* did not apply (Pet. App. 4A-6A). The court of appeals affirmed (Pet. App. 2A-3A). This is in accord with the rule in the Ninth Circuit, *Feichtmeir* v. *United States*, 389 F. 2d 498, and in seven other circuits, *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, February 24, 1970, No. 898, this Term; *United States* v. *Squeri*, 398 F. 2d 785, 788-790 (C.A. 2); *Caiello* v. *United States*, 420 F. 2d 471 (C.A. 2), certiorari denied, April 20, 1970, No. 1243, this Term; *United States* v. *Mancuso*, 378 F. 2d 612, 619 (C.A. 4), certiorari denied, 390 U.S. 955; *Agoranos* v. *United States*, 409 F. 2d 833, 835 (C.A. 5), certiorari denied, 396 U.S. 824; *United States* v. *Miriani*, No. 19274 (C.A. 6), decided February 20, 1970; *United States* v. *Maius*, 378 F. 2d 716, 718-719

[1] The court of appeals noted that petitioner was "told at the outset that [the agent] was a criminal investigator for the Internal Revenue Service and [was] affirmatively advised of his right to remain silent * * *" (Pet. App. 2A). Petitioner also complains that the warning was insufficient in failing to advise him in terms that his statements "can and will" be used against him (Pet. 17); such terms are, however, of dubious applicability at the outset of a criminal tax investigation.

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(C.A. 6), certiorari denied, 389 U.S. 905; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Hensley* v. *United States*, 406 F. 2d 481, 484 (C.A. 10).

Petitioner contends that these holdings, including the one in the case at bar, are in conflict with *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7), which upheld (2-1) a suppression order on the ground that a taxpayer must be given *Miranda* warnings "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division" (p. 1117). In *Dickerson*, unlike the present case, the taxpayer was given no warnings whatever. And the Seventh Circuit made its holding applicable only to "interrogations taking place after the date of this decision," July 28, 1969 (p. 1117). Thus, even if the *Dickerson* rule were applied to the case at bar the statements and records obtained from petitioner in the investigation would not be suppressible because they were obtained in 1965 and 1966.

In view of the purely prospective nature of the *Dickerson* holding and the present policy of the Internal Revenue Service to give virtually full *Miranda* warnings to all taxpayers when they are first interviewed by a special agent,[2] there should be few, if

[2] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this "new procedure goes beyond most legal requirements that are designed to advise persons of their rights." 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55,476.

any, future cases which will meet a different fate in the Seventh Circuit than in any other circuit. See, *e.g.*, *United States* v. *Campione*, 416 F. 2d 486 (C.A. 7), certiorari denied, February 24, 1970, No. 876, this Term. The conflict therefore does not warrant futher review by this Court.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOSEPH M. HOWARD,
CARLETON D. POWELL,
Attorneys.

APRIL 1970.

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